


1-1-1999

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David A. Wirth

Boston College Law School, wirthd@bc.edu

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Recommended Citation

David A. Wirth. "Some Reflections on Turtles, Tuna, Dolphin, and Shrimp." *Yearbook of International Environmental Law* 9, no.1 (1999): 40-47.

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Some Reflections on Turtles, Tuna, Dolphin, and Shrimp

David A. Wirth

The disputed *United States—Import Prohibition of Certain Shrimp and Shrimp Products* (*Shrimp-Turtle* dispute)¹ marks the first time that the World Trade Organization's (WTO) Appellate Body has opined on the unilateral use of trade measures to protect resources outside a country's jurisdiction. This is a highly controversial issue that has been of intense interest since at least the General Agreement on Tariffs and Trade (GATT) *United States—Restrictions on Imports of Tuna* (*Tuna-Dolphin*) panel report in 1991.² As a result of the somewhat anomalous situation in which the first *Tuna-Dolphin* report was not presented by the complaining party to the GATT Council, while a second report in essentially the same dispute³ remained unadopted by the Council at the time of the dissolution of the GATT and its replacement by the WTO, observers of, and participants in, the multilateral trading system have had a considerable period of time in which to reflect on the generic problem. This setting also makes for a fascinating case study in the evolution of analytical tools for addressing this challenging issue.

I. UNILATERAL ENVIRONMENTAL MEASURES EMPLOYING TRADE RESTRICTIONS

Comparing the panel reports in *Tuna-Dolphin I*, and *Tuna-Dolphin II*, and *Shrimp-Turtle*, one cannot help but be struck by the disparate treatment of similar issues by the different panels notwithstanding that the results in all three instances were the same. The result in the first report turned in great

¹ United States—Prohibition of Shrimps and Certain Shrimp Products, WTO Doc. WT/DS58/AB/R (98-000) (12 October 1998) [hereinafter Appellate Body Report]; United States—Import Prohibition of Certain Shrimp and Shrimp Products, WTO Doc. WT/DS58/R (15 May 1998) [hereinafter Panel Report]. The Dispute Settlement Body adopted the Appellate Body Report and the Panel Report, as modified by the Appellate Body Report, on 6 November 1998.

² United States—Restrictions on Imports of Tuna, 39 GATT BISD 155 (1993), reprinted in 30 ILM 1594 (1991) [hereinafter *Tuna-Dolphin I*].

³ United States—Restrictions on Imports of Tuna, DS29/R (1994), reprinted in 33 ILM 839 (1994) [hereinafter *Tuna-Dolphin II*].

measure on the extrajurisdictional location of the resource, the outcome in the second on the use of trade measures to leverage the environmental policies of another contracting party, and the holding in the third on “threat[s] to the multilateral trading system” as operative tests for distinguishing between measures permitted by, or inconsistent with, the GATT. Taken together, these three reports are persuasive evidence of a lack of consistency among the panels, if not necessarily an argument for the rigidity of a system of *stare decisis*.

The report of the Appellate Body in the *Shrimp-Turtle* case represents an amalgam of perspectives found in some measure in the earlier panel reports, but in a more nuanced form. The significant disparities in analytical approach among the four reports, including the Appellate Body’s report, also highlight the extent to which the panels are genuinely in the business of making new law in a relatively unfettered manner while purporting to resolve particular disputes through the application of the WTO agreements, the texts of which do not expressly address the generic problem. At the same time, a strict rule of *stare decisis* or even a quest merely for a minimal level of consistency can be a two-edged sword. The Appellate Body noted the need to interpret GATT 1947 “in the light of contemporary concerns of the community of nations about the protection and conservation of the environment”⁴—a perspective described as “by definition, evolutionary.”⁵ In comparison to the three prior treatments of the generic issue by panels, the Appellate Body’s identification of the need to interpret WTO disciplines in light of evolving norms bodes well for the effective inclusion of environment and other competing non-trade values in the WTO regime.

In comparison with the two *Tuna-Dolphin* reports and the *Shrimp-Turtle* panel decision, the Appellate Body’s analysis is noteworthy for its much more subtle treatment of the general problem, which is presented in concrete terms in the *Tuna-Dolphin* and *Shrimp-Turtle* disputes. At least on the surface, the Appellate Body also appeared appreciably more receptive to the environmental policies that the challenged measures sought to promote. To that extent, the Appellate Body in the *Shrimp-Turtle* case corrected overreaching by not one, but three, panels. The Appellate Body did not cite the earlier *Tuna-Dolphin* panel reports. In light of the uncertain status of those decisions as authoritative interpretations of the GATT, the Appellate Body’s treatment of this dispute as a case of first impression was most desirable. It remains to be seen whether the Appellate Body’s report is the first definitive entry in an ongoing discourse over this principled issue or whether it purports to be the last word in the debate.

The Appellate Body relied, apparently for the first time, on the passage in the first preambular paragraph of the Marrakesh Agreement Establishing the

⁴ Appellate Body Report, *supra* note 1, at para. 129.

⁵ *Id.* at para. 109 (quoting International Court of Justice).

World Trade Organization (WTO Agreement),⁶ which addresses sustainable development and the environment. Noting that the preamble gives “colour, texture and shading” to the substantive obligations in the WTO agreements, the Appellate Body accordingly went on to interpret Article XX with an eye not only to the benefits to international trade from the WTO regime of agreements, but also a receptivity to the sometimes competing environmental concerns motivating the challenged measure.

The Appellate Body, as it had prefigured in the *United States—Standards for Reformulated and Conventional Gasoline* case (*Reformulated Gasoline* case),⁷ which was the Appellate Body’s first ruling under the new WTO system, suggested that there is a low threshold for application of the exception in Article XX(g) that concerns the conservation of exhaustible natural resources. This is an important signal, as GATT panels had earlier found a need for rigorous scrutiny before accepting the availability of both this exception and the parallel one in Article XX(b), which concerns the protection of human, animal, or plant life or health. In an almost offhand way, the Appellate Body seems to have found that all migratory sea turtles fall within the scope of Article XX(g), notwithstanding that only some species traverse waters under the jurisdiction of the United States. Opining somewhat obliquely that “in the specific circumstances of the case before us, there is a sufficient nexus between the migratory and endangered marine populations involved and the United States for purposes of Article XX(g),”⁸ the Appellate Body appears to have dispatched for all time the argument of the first *Tuna-Dolphin* panel concerning the impermissible character of trade restrictions intended to protect resources outside a state’s jurisdiction.

The most salient feature of the report is very likely the space left by the Appellate Body for future appropriate uses of trade-related measures of the sort challenged in this dispute. As in its earlier report in the *Reformulated Gasoline* controversy, the result in this dispute was determined by the application of the chapeau to Article XX and, particularly, its tests of “unjustifiable” or “arbitrary” discrimination. Here, the Appellate Body emphasized the application of the measure in the dispute at hand, thereby minimizing any implication that the structure of the US program was inherently flawed. In other words, the basis for the Appellate Body’s holding was sufficiently narrow as to leave some prospects for states to employ similar measures to those challenged in this case, so long as those requirements are appropriately applied. Perhaps as important as what the Appellate Body said was what it

⁶ Marrakesh Agreement Establishing the World Trade Organization, Annex 2, in Results of the Uruguay Round of Multilateral Trade Negotiations—The Legal Texts 404 (1994), reprinted in 33 ILM 1125 (1994).

⁷ United States—Standards for Reformulated and Conventional Gasoline, WTO Doc. WT DSS/AB/R (20 May 1996), reprinted in 35 ILM 603 (1996). See also <<http://www.wto.org/wto/dispute/distab.htm>>.

⁸ Appellate Body Report, *supra* note 1, at para. 133.

did not say. Specifically, the Appellate Body did not reaffirm *in toto* the reasoning of the panel in the *Shrimp-Turtle* case nor did it affirm either of the previous *Tuna-Dolphin* panels, all of which concluded that the unilateral measures challenged in those cases were inevitably defective because of their inherent structure.

The result in this case consequently turned on a variety of attributes, which were perhaps unique to this dispute, that the Appellate Body considered to be arbitrary or unjustifiable or both. In the first place, the US program required other states to adopt essentially the same regulatory program employing turtle excluder devices (TEDs), regardless of the other state's particular circumstances or the appropriateness of different strategies to achieve the goal of turtle conservation. Second, as an arbitrary or unjustifiable artifact of the US regulatory scheme, in certain cases, shrimp were excluded from the US market solely because they were caught in the waters of states that did not have a comparable program to that of the United States, even if the product had been harvested with the use of TEDs. Third, as a result of court orders in the extensive litigation on these issues that was occurring domestically within the United States, certain exporting states had more advance notice of, and a longer "phase-in" period to prepare for, the TEDs requirement than had the complaining parties. Fourth, the United States engaged in disparate treatment of various exporting countries in transferring the TEDs technology overseas. Fifth, the Appellate Body criticized the absence of transparency and of "basic fairness and due process"⁹ in the manner in which the United States unilaterally processes applications for the certification of foreign programs under the domestic statutory scheme.

In contrast to the two *Tuna-Dolphin* panels and the earlier *Shrimp-Turtle* panel, the Appellate Body's report in the present case does not conclude that measures such as those challenged in this dispute are categorically unacceptable. Rather, each of the five objections noted earlier could be cured through appropriate modifications to the US program. As an apparently independent basis for the result in the dispute, the Appellate Body additionally cited the failure of the United States to engage other states, including the complaining parties, in negotiations with the goal of a bilaterally- or multilaterally-agreed strategy for turtle conservation. In several passages, the Appellate Body pointed out that such overtures ought to have occurred before unilateral trade restrictions were imposed. While this defect, in contrast to the others identified by the Appellate Body, would be difficult to cure retroactively, the Appellate Body's report nevertheless suggests that a future case in which this admonition had been heeded might survive scrutiny. Most importantly, the Appellate Body report anticipates that states such as the United States at least under some circumstances could employ unilateral measures of the sort

⁹ *Id.* at para. 181.

challenged in this dispute as walkaway or failsafe options even if negotiations are undertaken. This implicit but strongly suggested result preserves the principal value of such import restrictions as incentive-creating, leadership tools that discourage what is often a least-common-denominator, downward drag diluting the rigor of internationally agreed measures in multilateral negotiations.

II. THE ROLE OF SCIENCE IN WTO DISPUTE SETTLEMENT

The posture of this dispute also demonstrates the need for greater policy and technical attention to the role of science in trade agreement dispute settlement processes. On its own motion, the panel responded to the scientific and technical questions raised by the dispute by deciding to seek scientific advice. After requesting nominations from the parties, the panel chose five experts who were consulted individually in their personal capacities. After again consulting with the parties, the panel then submitted written questions to these experts, who subsequently attended a meeting with the panel and the parties to discuss their written responses and to provide additional information.

The *Shrimp-Turtle* panel consulted the independent scientists for their opinions on the migratory patterns of sea turtles, the presence of the animals in particular waters, the relationship between turtles and shrimping operations, the efficacy of TEDs under a variety of conditions, and the availability and effectiveness of conservation measures other than TEDs. Nonetheless, the extensive scientific evaluation undertaken by the panel had little, if any, operative significance for the report. Since the panel's inquiry had started and ended with the chapeau of Article XX, there was no need to examine most of the scientific questions addressed to the experts. In any event, the panel's scientific review presumably provided the factual basis for the Appellate Body's finding that Article XX(g) was available to the responding party in this case.

The Uruguay Round Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU) anticipates the formation by the panels of "expert review groups" to resolve "factual issue[s] concerning a scientific or other technical matter."¹⁰ According to the DSU, an expert review group prepares a draft report, which is to be made available to the parties to the dispute for comment, and a final version, which is transmitted to the panel and "shall be advisory only."¹¹ Although the DSU does not say so explicitly, the expectation seems to be that such a report would reflect the consensus view of the expert review group as a whole.

¹⁰ Understanding on Rules and Procedures Governing the Settlement of Disputes, 15 April 1994, art. 19, para. 1, Marrakesh Agreement Establishing the World Trade Organization, Annex 2, in Results of the Uruguay Round of Multilateral Trade Negotiations—The Legal Texts 404 (1994), reprinted in 33 ILM 1226 (1994).

¹¹ *Id.* at App. 4, para. 6.

A procedure for securing scientific expertise from several independent experts, similar to that employed in the *Shrimp-Turtle* case, was utilized by the panel in the earlier *EC Measures Concerning Meat and Meat Products* dispute (*Beef Hormones* dispute). The Appellate Body's report in that dispute¹² approved the process used in that case with scant analysis. The *Measures Affecting the Importation of Salmon* dispute, which involved restrictions on the importation of salmon into Australia to prevent disease,¹³ and another case in which Japan's practice of variety-by-variety testing of imported fruit for the effectiveness of quarantine treatment¹⁴ utilized the basic model crafted in the *Beef Hormones* dispute, which suggests that this pattern of consultation with a multiplicity of independent experts and subsequent synthesis of those scientific views by the panel has become something of a standard practice by panels.

This strategy has the advantage of ensuring that the panel has access to a range of perspectives and that the process of scientific consultation is relatively transparent. These procedures, however, leave the resolution of divergences in the scientists' responses and of disputed questions of scientific "fact" in the hands of the members of the panel and not in those of the scientists themselves or the scientific community. Since scientific questions were largely peripheral to the analytical inquiry required of the panel and the Appellate Body, this consideration was probably of little importance in the *Shrimp-Turtle* dispute. This attribute can, however, be expected to be rather more important in other cases, such as the *Beef Hormones* dispute, whose outcomes turn more directly on tests of scientific validity.

Although the DSU may not have precluded alternative means of consultation on scientific matters, as the Appellate Body found in the *Beef Hormones* dispute, a technique employing multiple individual responses has now been employed by panels in at least four disputes. At the same time, an expert review group has not been created in a single one. That is not to say that an expert review group is superior to the procedures actually employed by these recent panels or that the drafters of the DSU intended expert groups to be the sole vehicle for consultation between panels and scientists. Nonetheless, this arguable departure from the intent of the drafters of the DSU, whether a salutary development or not, highlights the need for an entity that is qualified to

¹² European Community—Measures Concerning Meat and Meat Products, WTO Doc. WT/DS26/AB/R and WT/DS48/AB/R (16 January 1998). See also <<http://www.wto.org/wto/dispute/distab.htm>>.

¹³ Australia—Measures Affecting Importation of Salmon, Panel Report, WTO Doc. WT/DS18/R (12 June 1998), see also <<http://www.wto.org/wto/dispute/distab.htm>>; Australia—Measures Affecting Importation of Salmon, Appellate Body Report, WTO Doc. WT/DS18/AB/R (20 October 1998), see also <<http://www.wto.org/wto/dispute/distab.htm>>.

¹⁴ Japan—Measures Affecting Agricultural Products, Panel Report, WTO Doc. WT/DS76/R (27 October 1998), see also <<http://www.wto.org/wto/dispute/distab.htm>>; Japan—Measures Affecting Agricultural Products, Appellate Body Report, WTO Doc. WT/DS76/AB/R (22 February 1999), see also <<http://www.wto.org/wto/dispute/distab.htm>>.

address this question to undertake a further inquiry into the appropriate treatment of scientific evidence in the quasi-adjudicatory, adversarial setting of a trade agreement dispute settlement panel. This might well be an appropriate issue for a subsequent thorough examination by an independent group of scholars, scientists, and other individuals who have relevant expertise, convened under the auspices of the WTO's Committee on Trade and Environment.

III. PUBLIC PARTICIPATION IN WTO DISPUTE SETTLEMENT

The question of public participation in trade agreement dispute settlement processes has attracted a great deal of attention in the earlier *Tuna-Dolphin* disputes as well as in later cases. In an apparent attempt to force the issue as a test case, several non-governmental organizations made submissions as *amicus curiae* directly to the panel. Concluding that it had no authority under the DSU to consider such submissions, the panel rejected them. The United States then appended similar statements from some of the same organizations to its submission to the panel, which the panel was prepared to accept, and adopted a similar approach in transmitting appended non-governmental submissions to the Appellate Body in the case.

The Appellate Body reversed the panel, concluding that it had erred in finding that it was without authority to accept the non-governmental submissions. The Appellate Body did not, however, hold that the panel was obliged to accept the submissions. The result is something of a halfway measure that clearly leaves considerable discretion to panels without, so far as can be determined, much in the way of oversight by the Appellate Body for abuse by panels of that discretion. On the one hand, this development represents some progress in improving and regularizing the transparency of, and direct access to, WTO dispute settlement processes on the part of non-state actors. Had the Appellate Body concluded otherwise, non-governmental statements could still be appended to the submissions of states as disputing parties. However, it does not require much ingenuity to imagine a situation in which the litigation posture of a government and the interests of certain of its domestic constituencies are in opposition and not in harmony, as was the case in the *Shrimp-Turtle* dispute. In such a situation, those interests would have no voice, at least in a formal manner, which would result in a process that is neither predictable in its operation nor neutral with respect to outcome.

On the other hand, the opening presented by the Appellate Body may prove to be either illusory in practice or sufficiently variable in application that it is not predictable. The practical fallback alternative will then likely be the current system, similarly uncertain, in which state parties to the dispute may, but need not, append non-governmental analyses from private parties within their jurisdiction to the state's own submission. It would seem, at an

absolute minimum, to be desirable for the Appellate Body to utilize an appropriately framed subsequent appeal as an occasion for articulating general standards for panels to apply in accepting or rejecting non-governmental submissions. It will be interesting to see whether, in the absence of further “legislative” instructions from the WTO members, the Appellate Body will consider the issue of public participation to be resolved for all time or whether the Appellate Body will be prepared to encourage still further progress on this question.

The Appellate Body’s report in the *Shrimp-Turtle* case is an important milestone in each of these important areas—the deployment of unilateral trade-related measures, the role of science in WTO dispute settlement, and public participation in panel processes. With respect to each of these issues, however, substantial questions remain. Consequently, the Appellate Body’s report is likely to represent an interim juncture, as opposed to the last word, on these important elements of the trade-and-environment debate.